Noh bin Abdul Aziz & Anor v Director of Lands and Surveys, Kota Kinabalu & Anor

HIGH COURT (TAWAU) — ORIGINATING MOTION NO T(25)-01 OF 1999
RICHARD MALANJUM J
30 AUGUST 1999

Administrative Law *— Remedies — Certiorari — Application for — Cancellation of request for survey plan by Director of Lands and Surveys — Request for survey plan should not have been issued as land had been approved only for logging and not for agriculture — Whether decision to cancel was in excess of jurisdiction and in breach of legitimate expectation — Whether decision was susceptible to judicial review and on what grounds*

The first applicant claimed to be the beneficiary and/or administratrix of the estate of one Pn Mariam while the second applicant claimed to be the beneficiary and/or administratrix of the estate of one Hajjah Shaffiah. Both applicants had obtained the necessary orders from the syariah court. By letters dated 13 January 1973 (CKM-3) and 15 February 1973 (CKM-4) respectively, the Setiausaha Hasil Bumi ('SHB') informed Hajjah Shaffiah and Pn Mariam that their applications for the land with timber had been approved. The two approvals were amongst those listed in the letter dated 25 October 1973 to the assistant collector of land revenue whereby the SHB agreed that the area to be allotted to the listed approvals was for logging only if it was not suitable for cultivation. On 3 December 1973, Pn Mariam and Hajjah Shaffiah submitted their respective applications (CKM-5) and CKM-6 respectively) pursuant to s 12 of the Sabah Land Ordinance. The applications were duly registered. On 29 December 1973, the first respondent instructed the district surveyor to issue a Request for Survey Plan ('RSP') to a private surveyor to survey the land for logging. Temporary occupation licenses ('TOL') were also issued in connection with the applications on 25 April 1974. In these TOL, one of the conditions stated therein was that the permission to occupy was given for the purpose of logging only. The RSP was issued on 22 October 1998. Subsequently, a letter dated 1 December 1998 (CKM-24) from the first respondent gave instruction to postpone the survey and the processing of the RSP until further notice. By letter dated 23 December 1998 (CKM-26), the SHB informed the first respondent in view of the RSP had been issued, the approval for the lands and the RSP should remain and should proceed. On 15 January 1999, the first respondent issued a letter to the assistant collector of land revenue informing him that the land had been approved for logging only and not for agriculture and that the RSP should not have been issued (CKM-27). On 25 January 1999, the district surveyor wrote to the private surveyor informing him that the RSP had been cancelled with immediate effect. The applicants filed a notice of motion seeking for an order that the decision of the first repondent to cancel the RSP be quashed on the grounds that the decision was in excess of jurisdiction and in breach

of legitimate expectation. The issue before the court were: (i) whether the applicants had the locus standi to commence the application; (ii) whether there was a decision made by the first respondent, and (iii) if so, whether it was susceptible to judicial review and on what grounds.

Held, dismissing the application:

(1) There were before the court two orders issued by the syariah court and the first respondent failed to show that the said court did not have the jurisdiction to issue such orders. Indeed, the first respondent could not have done so as it is clear under s 11(2) of the Syariah Court Enactment No 14 of 1992 that the syariah lower court has the jurisdiction to hear and decide on matter pertaining to division of and inheritance of property, testate or intestate. Further, the court should be entitled to rely on s 114(e) of the Evidence Act 1950 in accepting the validity of the orders. Moreover, there was nothing wrong for the applicants to go before the syariah court for such orders even if it is also within the jurisdiction of the civil courts. Accordingly, there was no merit in the objection of the first respondent as to the locus standi of the applicants (see pp 789I–790B, D).

(2) The first respondent made no mention of cancellation of the RSP in CKM-27. At most, the first respondent stated that the extension/issuance of the RSP should not have been allowed. But at the same time, the first respondent did not object to the contents of CKM-28. This omission cannot be taken as having the consequence of imputing to the first respondent the decision to cancel the RSP as conveyed by CKM-28. In the absence of any instruction from the first respondent to cancel the RSP, imputation alone would not do (see pp 790H–791A). The district surveyor in his own capacity and not on behalf of the first respondent wrote CKM-28. And there was nothing in CKM-28 which show that the district surveyor was under the direction of the first respondent to write it (see pp 791I–792A).

(3) The applicants should have indicated in clear term the impugned decision or at least the document or documents which contained such decision. Accordingly, in view of the ambiguity of whether there exist a decision of the first respondent susceptible to be reviewed and that in the application itself it was not specified as such and in the nature of prerogative remedies, being discretionary, on this ground alone the order sought for should be refused (see p 791B–C).

(4) CKM-3 and CKM-4 on their own could not be taken as approvals for agricultural development in respect of the applications, specifically for the area of land subject to dispute. This conclusion was fortified by the fact that the TOL issued in connection with the applications only allowed for logging. Thus, on the

assumption that the area in dispute was the same as that was under the TOL given to Pn Mariam and Hajjah Shaffiah, at best the TOL was therefere only a license to occupy for logging purpose. And a land application alone did not entail any interest in land under the Ordinance. Further, from the document CKM-7, it was also clear that the direction to issue the RSP were confined to logging activity (see p 797A–C, E).

(5) Since there was no approval granted of any specific area of land for agricultural purpose in connection with the applications and the fact that even the initial RSP issued in connection with the applications was authorized for logging only, there was therefore no reason for the issuance of the RSP as a renewal/extension of the previous one if it was extended for agricultual purpose. And it was not the case of the applicant that there was a cancellation of the RSP irrespective of its purpose. Therefore, the act or decision of the first respondent in cancelling the RSP, if at all CKM-28 could be attributed to him, was reasonable in the circumstances free from the deficiencies or defects (see p 797F–I).

(6) As it was the case of the applicants that the RSP was issued as a renewal/extension of an earlier RSP given in connection with approvals for agricultural purpose pursuant to the applications and for reason that there was no such approvals or initial RSP, it was therefore obvious that the issuance of the RSP was void of any legal basis and thus entitled no right or legitimate expectation to the applicants or to the estates of Pn Mariam and Hajjah Shaffiah. Therefore, there was no question of the first respondent being required to provide a hearing or even to act fairly before cancelling the RSP (see p 798C–E).

[Bahasa Malaysia summary

Pemohon pertama mendakwa beliau adalah benefisiari dan/atau pentadbir kepada harta pusaka seorang bernama Pn Mariam sementara pemohon kedua mendakwa beliau adalah benefisiari dan/atau pentadbir kepada harta pusaka seorang bernama Hajjah Shaffiah. Kedua-dua pemohon telah memperoleh perintah-perintah yang perlu daripada mahkamah syariah. Melalui surat-surat bertarikh 12 Januari 1973 (CKM-3) dan 15 Februari 1973 (CKM-4) masing-masing, Setiausaha Hasil Bumi ('SHB') telah memaklumkan kepada Hajjah Shaffiah dan Pn Mariam bahawa permohonan mereka untuk tanah dengan kayu balak telah pun diluluskan. Kedua-dua permohonan itu adalah antara yang disenaraikan di dalam surat bertarikh 25 Oktober 1973 kepada Penolong Pemungut Hasil Dalam Negeri di mana SHB telah bersetuju bahawa kawasan yang akan diperuntukkan kepada persetujuan-persetujuan yang disenaraikan adalah bagi pembalakan sahaja sekiranya ia tidak sesuai untuk pertanian. Pada 3 Disember 1973, Pn Mariam dan Hajjah Shaffiah mengemukan permohonan masing-masing (CKM-5 dan CKM-6 masing-masing) menurut s 12

Ordinan Tanah Sabah. Permohonan-permohonan itu telah didaftarkan segera. Pada 29 Disember 1973, responden pertama telah mengarahkan juru ukur daerah untuk mengeluarkan satu Permintaan untuk Pelan Juru Ukur ('PPJ') kepada seorang juru ukur persendirian untuk menilai tanah bagi pembalakan. Lesen-lesen Pendudukan Sementara ('LPS') juga dikeluarkan berhubung dengan permohonan itu pada 25 April 1974. Di dalam LPS ini, salah satu daripada terma-terma yang dinyatakan adalah bahawa persetujuan untuk menduduki diberikan bagi tujuan pembalakan sahaja. PPJ telah dikeluarkan pada 22 Oktober 1998. Berikutan itu, satu surat bertarikh 1 Disember 1998 daripada responden pertama memberi arahan untuk menangguhkan pengukuran itu dan proses PPP itu sehingga diberi notis selanjutnya (CKM-24). Melalui surat bertarikh 23 Disember 1998, SHB telah memaklumkan kepada responden pertama berhubung dengan PPJ yang telah dikeluarkan, persetujuan bagi tanah-tanah itu dan PPJ hendaklah kekal dan diteruskan (CKM-26). Pada 15 Januari 1999, responden telah mengeluarkan sepucuk surat kepada Penolong Pemungut Hasil Dalam Negeri memaklumkan bahawa tanah itu telah diluluskan untuk pembalakan sahaja dan bukan untuk pertanian dan bahawa PPJ itu tidak sepatutnya dikeluarkan (CKM-27). Pada 25 Januari 1999, juru ukur daerah telah menulis kepada juru ukur persendirian memaklumkan bahawa PPJ itu telah dibatalkan dengan serentak. Pemohon-pemohon telah memfailkan satu notis usul memohon satu perintah untuk keputusan responden pertama membatalkan PPJ itu dibatalkan atas alasan bahawa keputusan itu telah melebihi bidang kuasa dan melanggar harapan yang sah. Isu-isu yang dihadapkan ke mahkamah adalah: (i) sama ada pemohon-pemohon mempunyai locus standi untuk memulakan permohonan itu; (ii) sama ada terdapat keputusan yang dibuat oleh responden pertama; dan (iii) jika ada, sama ada ia adalah terbuka kepada kajian semula kehakiman dan atas alasan-alasan apa.

Diputuskan, menolak permohonan tersebut:

(1) Dua perintah telah dikeluarkan oleh mahkamah syariah dan responden pertama telah gagal untuk menunjukkan bahawa mahkamah tersebut tidak mempunyai bidang kuasa untuk mengeluarkan perintah-perintah tersebut. Sememangnya, responden pertama tidak boleh berbuat demikian kerana adalah jelas di bawah s 11(2) Enakmen Mahkamah Syariah No 14 tahun 1992 bahawa mahkamah rendah syariah mempunyai bidang kuasa untuk mendengar dan memutuskan perkara berhubung dengan pembahagian dan pewarisan harta, berwasiat atau tak berwasiat. Selanjutnya, mahkamah sepatutnya berhak bergantung kepada s 114(e) Akta Keterangan 1950 apabila menerima kesahan peintah-perintah itu. Lebih-lebih lagi adalah tidak salah bagi pemohon-pemohon untuk menghadap mahkamah syariah untuk perintah-perintah tersebut walaupun ia adalah juga di dalam bidang kuasa mahkamah sivil. Oleh

demikian, tiada merit di dalam bantahan responden pertama mengenai locus standi pemohon-pemohon (lihat ms 789I–790B, D). A

(2) Responden pertama tidak menyebutkan tentang pembatalan PPJ di dalam CKM-27. Paling banyakpun, responden pertama menyatakan bahawa lanjutan/keluaran PPJ sepatutnya tidak dibenarkan. Tetapi pada masa yang sama, responden pertama tidak membantah terhadap kandungan-kandungan di dalam CKM-28. Peninggalan ini tidak boleh diambil kira sebagai mengakibatkan anggapan terhadap responden pertama berkenaan dengan keputusan untuk membatalkan PPJ sebagaimana yang dinyatakan di dalam CKM-28. Di sebalik ketiadaan apa-apa arahan daripada responden pertama untuk membatalkan penyataan PPJ itu, imputasi sahaja tidak mencukupi (lihat ms 790H–791A). Juru ukur daerah di dalam kuasa beliau sendiri dan bukan bagi pihak responden pertama telah menulis CKM-28. Dan tidak terdapat apa-apa di dalam CKM-28 yang menunjukkan bahawa juru ukur adalah di bawah arahan responden pertama untuk menulisnya (lihat ms 791I–792A). B C D

(3) Pemohon-pemohon sepatutnya telah menunjukkan dengan jelas keputusan yang dipertikaikan atau sekurang-kurangnya dokumen atau dokumen-dokumen yang mengandungi keputusan tersebut. Sewajarnya, memandangkan ketaksaan sama ada wujud satu keputusan responden pertama yang mudah dikaji semula dan bahawa di dalam permohonan itu sendiri tidak dinyatakan secara khusus yang berikut dan di dalam bentuk remedi-remedi yang prerogatif, yang mengikut budi bicara, atas alasan ini sahaja perintah yang dipohon sepatutnya ditolak (lihat ms 791B–C). E

(4) CKM-3 dan CKM-4 dengan sendirinya tidak boleh diterima sebagai kelulusan untuk kemajuan pertanian berhubung dengan permohonan-permohonan itu, khususnya untuk kawasan tanah yang menjadi subjek pertikaian. Keputusan ini telah diperkuatkan dengan fakta bahawa LPS yang dikeluarkan berhubung dengan permohonan-permohonan itu hanya membenarkan pembalakan. Oleh itu, dengan mengambil andaian bahawa kawasan yang dipertikaikan itu adalah sama dengan LPS yang diberikan kepada Pn Mariam dan Hajjah Shaffiah, sebaik-baiknya LPS itu hanyalah merupakan satu lesen untuk digunakan bagi tujuan pembalakan. Dan satu permohonan tanah sahaja tidak melibatkan apa-apa kepentingan ke atas tanah di bawah Ordinan itu. Selanjutnya, daripada dokumen CKM-7 adalah jelas juga bahawa arahan untuk mengeluarkan PPJ itu terbatas kepada aktiviti pembalakan (lihat ms 797A–C, E). F G H

(5) Memandangkan tiada kelulusan diberikan ke atas mana-mana kawasan khusus tanah itu bagi tujuan pertanian berhubung dengan permohonan-permohonan itu dan fakta bahawa walaupun PPJ yang terdahulu dikeluarkan berhubung dengan permohonan-permohonan itu telah diberikan kuasa untuk pembalakan sahaja, dengan demikian tiada sebab untuk I

dikeluarkan PPJ sebagai satu pembaharuan/lanjutan yang terdahulu jika ia dilanjutkan bagi tujuan pertanian. Dan bukanlah kes bagi pemohon bahawa wujud pembatalan PPJ tidak mengambil kira tujuannya. Oleh itu, perbuatan atau keputusan responden pertama membatalkan PPJ itu, jika sekali pun CKM-28 mungkin disebabkan oleh beliau, adalah munasabah di dalam keadaan-keadaan tersebut, bebas daripada sebarang kekurangan atau kecacatan (lihat ms 797F–I).

(6) Memandangkan adalah kes bagi pemohon bahawa PPJ dikeluarkan sebagai satu pembaharuan/lanjutan daripada PPJ terdahulu yang diberikan berhubung dengan kelulusan bagi tujuan pertanian berikutan permohonan-permohonan tersebut dan oleh sebab tiada apa-apa kelulusan sepertinya atau PPJ yang asal, adalah jelas pengeluaran PPJ itu adalah tidak sah di sisi undang-undang dan oleh itu tidak memberikan hak atau harapan sah kepada pemohon-pemohon atau kepada harta pusaka Pn Mariam dan Hajjah Shaffiah. Oleh itu, tiada persoalan bahawa responden pertama diminta untuk mengadakan satu perbicaraan atau bertindak dengan adil sebelum membatalkan PPJ tersebut (lihat ms 798C–E).]

Notes

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Board of Education v Rice [1911] AC 179 (refd)

Comptroller of Income Tax v Yan Tai Min [1965] 1 MLJ 255

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

King Hock Ching v Ung Siew Ping [1974] 2 MLJ 16 (refd)

Lim Fong Tsin & Ors v The Assistant Collector of Land Revenue & Ors [1997] CLJ LN 7

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd [1996] 3 MLJ 94 (refd)

Majumder v Attorney General of Sarawak [1969] 1 MLJ 132 (refd)

Pergamon Press, Re [1971] Ch D 388 (refd)

R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex p Brough (1987) 19 HLR 367 (refd)

Regina v Statutory Visitors to St Lawrence's Hospital, Caterham; Ex parte Pritchard [1953] 1 WLR 1158 (refd)

Sa-Mal (Sabah) Corp Sdn Bhd v Director of Lands and Surveys, Sabah (OM No K 4 of 1992) (unreported) (refd)
Schmidt v Home Secretary [1969] 2 Ch D 149 (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 2 MLJ 241 (refd)
Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697 (refd)

Legislation referred to

Evidence Act 1950 s 114(e)
Probate and Administration Ordinance (Sabah) Cap 109 s 3
Rules of the High Court 1980 O 53 r 1(2)
Syariah Courts Enactment No 14 of 1992 s 11(2)

Adnan Hj Puteh (*Cheu Adnan & Razi*) for the applicants.
Mohd Amin bin Tenreng (State Attorney General's Chambers) for the first respondent.
Simon Shim (*Shim Pang & Co*) for the second respondent.

Cur Adv Vult

Richard Malanjum J:

The application

By way of a notice of motion dated 22 March 1999 (encl 19) the first and second applicants ('the applicants') seek for the following orders, namely:

1 An order that the decision of the Director of Lands and Surveys Department, Kota Kinabalu to cancel the Request of Survey Plan ('RSP') number 98119088 issued on 22 October 1998 for PT 73111602 and PT 73111606 situate at Ulu Segama, Lahad Datu be quashed on the grounds that the decision was in excess of jurisdiction and in breach of legitimate expectation;

2 An order that the director of Lands and Surveys Department, Kota Kinabalu be compelled to carry out the instructions from the Secretary of Hasil Bumi to enforce the Request of Survey Plan ('RSP') number 98119088 dated 22 October 1998,

3 The costs of this application be borne by the respondent, and

4 Further or better relief as this honourable court may grant.

And the application was made pursuant to the leave which I granted on 10 March 1999. In support thereof, the applicants relied upon the affidavits and the statement filed for the ex parte application for leave. Initially, only the first respondent was cited as a party. However, the second respondent intervened to be added as a party to the proceeding. In all there are six affidavits filed by the parties in this matter.

For the applicants the affidavits filed are as follows:

(1) the affidavit of Noh Abdul Aziz affirmed on 26 January 1999 (Noh's affidavit);

(2) the affidavit of Rosnah bte Yahya affirmed on 26 January 1999 (Rosnah's affidavit);

(3) the affidavit of Chu Kok Mou sworn to on 27 January 1999 (Chu's first affidavit);

(4) the further affidavit in support of Chu Kok Mou sworn to on 24 March 1999 (Chu's second affidavit).

Whereas for the first respondent, there is the affidavit of Hj Dahalan Hj AH Tengah affirmed on 19 May 1999 (Dahalan's affidavit). And finally for the second respondent there is the affidavit of Kwan Ngen Wah affirmed on 12 April 1999 (Kwan's affidavit).

Now, the statement filed pursuant to O 53 r 1(2) of the Rules of the High Court 1980 states:

1 The name of the first applicant is Noh Bin Abdul Aziz (NRIC No H0403028).

2 The name of the second applicant is Rosnah Bte Yahya (NRIC No 440725-12-5090)

3 The relief sought is for —

(i) An order that the decision of Director of the Lands and Surveys Department, Kota Kinabalu to cancel the Request of Survey Plan ('RSP') number 98119088 dated 22 October 1998 for PT 73111602 and PT 73111606 both situate at Ulu Segama, Lahad Datu ('the said Lands') be quashed on the grounds that the decision was in excess of jurisdiction and in breach of legitimate expectation,

(ii) an order that the Director of Lands and Survey Department, Kota Kinabalu be compelled to carry out the instructions from the Permanent Secretary of Hasil Bumi to enforce the Request of Survey Plan ('RSP') number 98119088 dated 22 October 1998.

4 The grounds upon which the said relief is sought are set out in the affidavit of the first and second applicant both affirmed on 26 January 1999, filed and served in support of this motion and are as concisely as follows —

(i) The approval to alienate land to Hajjah Shaffiah bte Hj Salahuddin ('the second deceased') was given by the Chief Ministers Department on 13 January 1973.

(ii) The approval to alienate land to Mariam bte Abdullah ('the first deceased') was given by the Chief Ministers Department on 15 January 1973.

(iii) Pursuant to s 12 of the Land Ordinance 1930, the applications for state land for the first and second deceased were made on 1 December 1973. The Assistant Collector of Land Revenue ('the ACLR') recommended that a premium of RM25per acre be paid.

(iv) On 29 December 1973, the Director of Lands and Surveys instructed the district surveyor to issue a Request for Survey Plan ('RSP') to licensed private surveyors to survey the land for logging.

(v) Temporary Occupation Licence was issued to the first and second deceased and premiums for the said Lands have been duly paid.

(vi) On behalf of the first and second deceased, the first and second applicants wrote to the Director of Lands and Surveys Department on 18 June 1998 informing him that the application for the said

Lands have been approved and requested that the RSP for the said Lands be issued for the applicants' further action. A

(vii) The ACLR, Lahad Datu had written to the Director of Lands and Surveys Department on 25 June 1998 informing his that based on their records the applications for the first and second Applications have not been cancelled and are still in force.

(viii) On 28 July 1998, the ACLR, Lahad Datu wrote to the Director of Lands and Surveys Department enclosing a copy of the Notice under s 13 which has been completed for the first and second deceased applications for State Land. B

(ix) The Director of Lands and Surveys Department wrote to the District Surveyor on 15 August 1998 and on 21 August 1998 to extend the RSP for one more year from the date of the respective letters.

(x) The survey fees for the said lands amounting to RM14,980 and RM12,845 respectively together with the basic charges have been duly paid by the first and second applicants for and on behalf of the first and second deceased on 16 October 1998. C

(xi) On 22 October 1998, the Lands and Surveys Department issued the RSP number 98119088 to one En Sheak Kam Ti, a registered licensed surveyor to carry out the survey for the said Lands. D

(xii) The District surveyor of Lahad Datu wrote to the Licensed Surveyor, En Sheak Kam Ti, on 30 October 1998 instructing him to postpone the survey for the said Lands.

(xiii) On 1 December 1998, the Lands and Surveys Department, Kota Kinabalu have instructed the District Surveyor to postpone the RSP number 98119098 for the said Lands until further notification. E

(xiv) On 3 December 1998, the Lands and Surveys Department wrote to the Secretary of Hasil Bumi for advice and further instructions.

(xv) On 23 December 1998, the Secretary of Hasil Bumi informed the Lands and Surveys Department in view of the RSP number 98119088 has been issued, they are of the opinion that the approval for the said Lands and the RSP 98119088 should remain and should proceed. F

(xvi) On 15 January 1999, the Lands and Surveys Deparment, Kota Kinabalu issued a letter to the ACLR informing him that the said Lands have been approved for logging only and not for agriculture. It further stated that the RSP 98119088 should not have been issued.

(xvii) On 25 January 1999, the District Surveyor of Lahad Datu wrote to Sheak Kam Ti, informing him that the RSP 98119098 has been cancelled with immediate effect. G

5 At the substantive hearing for the motion, the first and second applicants will rely on the grounds set out in length as stated in the first and second applicants' affidavits both affirmed on 26 January 1999 as well as the affidavit of Chu Kok Mou sworn on 27 January 1999 and filed herein. H

The background

The first applicant is claiming to be the beneficiary and/or administratrix of the estate of one Pn Mariam bte Abdullah ('Pn Mariam') while the second applicant says that she is the beneficiary and/or administratrix of the estate of one Hajjah Shaffiah bte Hj Salahuddin ('Hajjah Shaffiah'). Both applicants do so by virtue of their respective Syariah Court Orders SS–12– I

176 tahun 1998 (NA-1 of Noh's affidavit and RY-1 of Rosnah's affidavit).

From the affidavits filed and relied upon in this application it can be gathered the background events in the chronological order as follows:

By a letter dated 15 February 1973 (CKM-4 of Chu's first affidavit), the Setiausaha Hasil Bumi informed Pn Mariam that her application for land with timber up to an area of 500 acres had been approved in accordance with the new land alienation policy. The other terms stated therein were that there would be extraction charge payable at the rate of 15 cent per cubic foot and such other conditions as might be stipulated by the Director of Lands and Surveys Department. Pn Mariam was also given the liberty to find an area later on in connection with the approval since there was no definite area identified in her application.

Earlier on Hajjah Shaffiah also received a similar reply from the Setiausaha Hasil Bumi vide a letter dated 13 January 1973 (CKM-3 of Chu's first affidavit). But in her case it was an approval for an increase of the area earlier approved under LA 69110670 from 150 acres to 500 acres. Otherwise the other terms were the same as those given to Pn Mariam, including the liberty to find an area at a later date.

And these two approvals were amongst those listed in the letter of the Setiausaha Hasil Bumi dated 25 October 1973 (HDHT-3 of Dahalan's affidavit) to the Penolong Pemungut Hasil Tanah, Beluran. In the said letter a plan was annexed of an area of state land that was identified and described as available and that the Setiausaha Hasil Bumi agreed that the area be allotted to the listed approvals therein for logging only if it was not suitable for cultivation.

After that said letter of 25 October 1973 (HDHT-3) there was no indication whether the area identified was actually allotted to the listed approvals. In any event on 3 December 1973 Pn Mariam and Hajjah Shaffiah submitted their respective land applications together with sketch plans of the areas to be applied for (CKM-5 and CKM-6 of Chu's first affidavit) pursuant to s 12 of the Sabah Land Ordinance ('the Ordinance'). But it is clear in both the land applications that the sketch plans show the areas to be in the District of Lahad Datu and not Beluran. Anyway, the land applications were duly registered with registration numbers namely LA No 73111606 for Pn Mariam and LA 73111602 for Hajjah Shaffiah ('the applications').

By a letter dated 29 December 1973 (CMK-7 of Chu's first affidavit) the Pengarah Tanah dan Ukur instructed the Juru Ukur, Lahad Datu to issue Request for Survey Plan (RSP), if requested, to those land applications listed therein which included the said applications. But I noted that the said letter was entitled 'PT 73111602-609, 73111640-642 untuk membalak sahaja', which freely translated to mean 'PT 73111602-609, 73111640-642 for logging only'.

Temporary occupation licenses (TOL) were also issued in connection with the said applications on 25 April 1974 (CKM-8 of Chu's first affidavit and C-1 of Chu's second affidavit). In these TOL, one of the conditions stated therein was that the permission to occupy was given for the purpose

of logging only. And there was also payment of premium amounting to RM12,500 in addition to the annual quit rent and other expenses for each of the TOL. A

It is not disclosed in this present application as to what happened after the issuance of the TOL. But in the letter of the Pengarah Tanah dan Ukur dated 25 August 1981 (CKM-9 of Chu's first affidavit) to the Penolong Pemungut Hasil Tanah, Lahad Datu, it was enquired whether the land applied for under the said applications, amongst others, were for logging or for agricultural purpose. A reply from the Penolong Pemungut Hasil Tanah Lahad Datu dated 7 September 1981 (CKM-10 of Chu's first affidavit) confirmed that the land applications listed in CKM-9 were for agricultural purpose. But the fate of the said applications seemed to have stopped there. Even the applicants affirmed in their respective affidavits that the said applications were allowed to lapse 'through the effect of time'. B C

Then by two letters both dated 18 June 1998 (CKM-11 and CKM-12 of Chu's first affidavit) to the Pengarah Jabatan Tanah dan Ukur and purportedly signed by Pn Mariam and Hajjah Shaffiah, requests were made for the issuance of RSP on the basis that the said applications were approved some time ago. There was supposed to have been a copy of the approval letter under reference LS 1101.1.530/3 dated 29 December 1973 enclosed with those letters. Unfortunately, before me only the letters were exhibited without any copy of letter of approval as alleged. In any event the two letters appear to have awakened the said applications. In his letter to the Pengarah Tanah dan Ukur dated 25 June 1998 (CKM-13 and 14 of Chu's first affidavit) the Penolong Pemungut Hasil Tanah, Lahad Datu confirmed that the said applications had not been cancelled and were still effective. He also went on to say that notices under s 13 of the Ordinance were being exhibited and copies would be given to the Pengarah upon the expiry of the notification period. And in fact copies of the notices were sent to the Pengarah on 28 July 1998 (CKM-15 and 16 of Chu's first affidavit). Then in his two letters both dated 15 August 1998 (CKM-17 and 18 of Chu's first affidavit) addressed to the Jurukur Daerah Lahad Datu in connection with the said applications, the pengarah tanah dan ukur considered the final extension of the RSP for the said applications for a period of one year commencing from the date of the said letter, ie 15 August 1998. It was also a condition that a new RSP should to be issued through the Lembaga Jurukur Sabah. Thereafter an application was made for the issuance of RSP and the necessary fees were paid amounting to RM28,775 (CKM-21 of Chu's first affidavit). The result of those steps taken was that the RSP 98119088 ('the said RSP') was issued on 22 October 1998 to a licensed private surveyor En Sheak Kam Ti. But I doubt if survey work had begun when by a letter dated 30 October 1998 (CKM-23 of Chu's first affidavit) the Jurukur Daerah, Lahad Datu informed En Sheak to postpone the survey work for the time being. And in the said letter there was a reference to a telephone conversation of the jurukur daerah with the Pengarah Tanah dan Ukur. Subsequently, a letter dated 1 December 1998 (CKM-24 of Chu's first affidavit) from the Pengarah Tanah dan Ukur to the Jurukur Daerah Lahad Datu gave instruction to postpone the survey and the processing of D E F G H I

A the said RSP until further notice. Meanwhile, the Pengarah Tanah dan Ukur wrote to the Setiausaha Hasil Bumi vides his letter dated 3 December 1998 (CKM-25 of Chu's first affidavit). In the said letter the Pengarah gave a brief background of the matter at hand and thereafter made the following recommendations that read thus:

B
> 7 Memandangkan terdapat pertindihan kawasan diantara PT 73111602 dan 73111606 serta PT 96110813, pejabat ini mengarahkan supaya pengukuran RSP 98119088 untuk PT 73111602 dan 73111696 ditangguhkan sehingga penyelesaian dicapai.
>
> 8 Berdasarkan ulasan Juru Ukur Daerah, kawasan yang tersedia ialah 930 ekar tetapi kawasan ini telah diluluskan kepada PT 96110813 — Miyasa Sdn Bhd ialah 600 ekar melalui MNR 133/2697/73 bertarikh 06 Oktober 1998. Maka terdapat baki seluas 300 ekar lagi. Walaubagaimanapun pengagihan kawasan adalah tertakluk kepada pihak tuan. (Rujuk ulasan DSLD 1101.1.5 Vol XI/13 bertarikh 14 April 1998 dan peta disertakan).
>
> 9 Dimajukan perkara diatas untuk nasihat dan arahan selanjutnya.

D The foregoing letter was given a reply by the Setiausaha Hasil Bumi on 23 December 1998 (CKM-26 of Chu's first affidavit). And the content of the reply states, inter alia:

> 2 Sila maklum bahawa memandangkan RSP 98119088 telahpun dikeluarkan kepada PT 73111602 dan PT 73111606 maka pejabat ini berpendapat kelulusan permohonan tanah tersebut dan RSP 98119088 adalah dikekalkan dan perlu diteruskan.
>
> 3 Dalam kes ini adalah sekali lagi diperhatikan bahawa PT 96110813 oleh Miyasa Sdn Bhd diluluskan berdasarkan kepada perakuan yang diterima dari pihak tuan bahawa kawasan tersebut masih tersedia dan tidak bertindih dengan kelulusan dari PT 73111602 dan PT 73111606.
>
> 4 Untuk menyelesaikan perkara ini maka pihak tuan adalah diminta untuk menasihati dan memaklumkan kepada syarikat Miyasa Sdn Bhd untuk mencari kawasan gantian. Pejabat ini mengesyorkan agar Miyasa Sdn Bhd diperuntukan kawasan gantian di kawasan Kalabakan, Tawau (Ex-FELDA Area) atau kawasan Tongod, Kinabatangan (Ex-Tongod Regional Planning Study Area) atau pihak pemohon boleh mencari kawasan gantian sendiri.
>
> 5 Sukacita dapat pihak tuan mengambil tindakan lanjut keatas keputusan ini dengan sewajarnya.

Now, without any reference to the letter of the Setiausaha Hasil Bumi aforementioned, the Pengarah Tanah dan Ukur wrote to the Penolong Pemungut Hasil Tanah, Lahad Datu on 15 January 1999 (CKM-27 of Chu's first affidavit) stating, inter alia, as follows:

> 2 Memandangkan kedua-dua permohonan tanah PT 73110602 dan PT 73110606 telah diluluskan hanya untuk membalak sahaja dan bukannya untuk tujuan pertanian dan tidak ada rekod menunjukkan surat tawaran telah dikeluarkan, justeru itu, perlanjutan/pengeluaran RSP 98119088 sepatutnya tidak dibenarkan.
>
> 3 Dalam hubungan ini, kelulusan yang telah diberikan kepada PT 96110813 Miyasa Sdn Bhd hendaklah diteruskan dan pengukuran bolehlah dijalankan berdasarkan kawasan yang telah diluluskan dalam

surat tawaran LS 1101 January 3891/39.

4 Jika terdapat baki kawasan sahaja, maka pemohon yang sama iaitu PT 73111606 bolehlah memohon semula kawasan tersebut dengan mengemukakan permohonan tanah baru dan diproses mengikut prosidur biasa untuk dikemukakan ke pejabat Setiausaha Hasil Bumi untuk kelulusan.

Thereafter the Jurukur Daerah Lahad Datu wrote to En Sheak Kam Ti on 25 January 1999 (CKM-28 of Chu's first affidavit) that states, inter alia:

2 Sukacita dimaklumkan pejabat ini telah menerima salinan surat dari Pengarah Tanah dan Ukur melalui surat LS 1101.1.3891/49 bertarikh 15 January 1999 yang antara lain menjelaskan tidak ada rekod menunjukkan surat tawaran telah dikeluarkan ke atas PT tersebut di atas. Sehubungan dengan itu surat arahan ukur melalui RSP 98119088 yang telah dikeluarkan kepada pihak tuan pada 22 Oktober 1998 adalah dibatalkan dengan serta merta. Sila maklumkan perkara ini kepada pemohon.

The foregoing letter of the Jurukur Lahad Datu appears to have prompted the applicants to commence this action as the ex parte application was filed on 28 January 1999. And if not for the subsequent application to amend the ex parte application (Encl 16) I would have disposed of it earlier. Meanwhile, the letter obviously did not halt the exchange of correspondences between the Pengarah Tanah dan Ukur and the Setiausaha Hasil Bumi. On 22 February 1999 (C-4 of Chu's second affidavit) the Setiausaha Hasil Bumi wrote to the Pengarah Tanah dan Ukur stating, inter alia, thus:

Dengan hormatnya, saya merujuk kepada surat bertarikh 12 Februari 1999 daripada Pn Hajjah Shaffiah bte Salahudin mengenai perkara tersebut diatas dan salinannya disertakan untuk rujukan dan tindakan tuan.

2 Sila maklum bahawa sebenarnya pejabat ini telahpun menyampaikan keputusan dan arahan seperti yang dipohon oleh tuan melalui surat pejabat ini Bil 96 bertarikh 23 Disember 1998 dalam siri yang sama dan salinan surat tersebut disertakan untuk rujukan dan tindakan lanjut tuan. Sila maklum bahawa keputusan yang disampaikan kepada tuan iaitu pengeluaran RSP 98119088 untuk PT 73111602 dan PT 73111606 dikekalkan dan perlu diteruskan adalah masih kekal dan muktamad. Oleh itu sila ambil tindakan lanjut keatas keputusan tersebut dengan kadar yang segera.

Subsequent to the above letter the Setiausaha Hasil Bumi again wrote another letter to the Pengarah Tanah dan Ukur on 16 March 1999 (KNW-3 of Kwan's affidavit) which made reference to an earlier letter of the Pengarah dated 8 February 1999. That letter must have given an explanation on the positions of the respective said land applications in question since the Setiausaha Hasil Bumi began his letter by thanking the Pengarah for his explanation. But as to why this letter of the Pengarah was not mentioned in the letter of the Setiausaha Hasil Bumi dated 22 February 1999 was not explained in any of the affidavits filed for this application. Anyway KNW-3 states, inter alia:

2 Selepas mengulangkaji perkara tersebut di atas, kami berpendapat

kelulusan kepada Miyasa Sdn Bhd boleh dikekalkan dan seterusnya surat kami Ruj MNR 133/2697/96 bertarikh 23 Disember 1998 dianggap batal sekiranya —

(a) boleh dipastikan dan boleh dipertahankan dari segi undang-undang bahawa PT 73110602 dan PT 73110603 hanya diluluskan untuk TOL membalak dan bukannya untuk tujuan pertanian;

(b) boleh dipastikan dan boleh dipertahankan dari segi undang-undang bahawa RSP 98119088 adalah dikeluarkan untuk tujuan membalak dan bukan untuk pertanian;

(c) boleh dipastikan dan boleh dipertahankan dari segi undang-undang bahawa bayaran premium sebanyak RM12,500 oleh Pn Hajjah Shaffiah bte Salahuddin yang dilakukan pada tahun 1974 adalah untuk TOL membalak dan bukan pertanian, dan

(d) surat daripada Pengarah Tanah dan Ukur kepada Juru Ukur Daerah, Lahad Datu Ruj; LS 1101.1.70 Vol 1/(110) bertarikh 15 Ogos 1998 adalah salah/tersilap dan boleh ditarik balik.

So much for the sequence of events and letters that are relevant in considering this application before me.

The contentions

In summary it is the contention of learned counsel for the applicants that the exercise of the discretionary power in respect of the orders sought for should be in favour of his clients. And his reasons are as follows:

(a) that the applicants have the locus standi to initiate the present application since they have obtained the necessary orders from the syariah court prior to the filing of this application;

(b) that the said land applications of Pn Mariam and Hajjah Shaffiah did not lapse upon their death. More so in this case where approvals had already been given as early as 1973;

(c) that this court has the jurisdiction to hear the present application as the impugned decision of the first respondent was made in excess of jurisdiction and denial of legitimate expectation;

(d) that letters of approval in respect of the said applications were granted by the Setiausaha Hasil Bumi as early as 1973;

(e) that the approval given to extend/renew the issuance of the said RSP in respect of the said applications for one year has created a contractual relationship between Pn Mariam and Hajjah Shaffiah of the first part and the first respondent of the other part;

(f) that from the correspondences between the first respondent and the Juruukur Daerah, Lahad Datu it is clear that the first respondent made the decision to cancel the said RSP issued in connection with the said applications;

(g) that although the power to alienate land lies with the first respondent, such power is subject to the general or specific instruction of the minister transmitted through the Setiausaha Hasil Bumi. And in the present case the minister through the Setiausaha Hasil Bumi has given instruction to the first respondent but was not complied with;

(h) that although there was a subsequent letter from the Setiausaha Hasil Bumi such letter was conditional upon the terms therein being met;

(i) that the averment that the approvals were given for logging only is not true as the approvals came with a condition that they would be for logging only if the pieces of land were not suitable for agriculture. Thus the approvals given for the said applications were for agricultural purposes. This is further supported by the fact that notices under s 13 of the Ordinance were issued;

(j) that it was confirmed by the Penolong Pemungut Hasil Tanah Lahad Datu in reply to the query from the first respondent that the said applications were for agriculture purposes and that had to be so as an application for country land is only allowable for agricultural purposes unless with permission of the minister;

(k) that premium had been paid when the temporary occupation licenses were issued and the amount paid coincided with the rate payable for land premium at that time; and

(l) that the approval given to the application of the second respondent by the Setiausaha Hasil Bumi was based on the misrepresentation of the first respondent that the area applied for was uncommitted. Hence the letter of offer issued to the second respondent is invalid as it was issued contrary to ss 9 and 49 of the Ordinance.

For the first respondent the basic points raised were as follows, in summary:

(1) that since there was no letters of offer granted and accepted in connection with the said applications, there was therefore no contractual relationship existing between the first respondent on one hand and Pn Mariam and Hajjah Shaffiah on the other;

(2) that approval and alienation of land is a decision of the first respondent under s 9 of the Ordinance;

(3) that mere land applications without approvals and RSP give no interest in land under the Ordinance;

(4) that the alienation to the second respondent was an exercise of discretion on the part of the first respondent and thus indicates the non-approval of the said applications;

(5) that since no letter of administration has been granted by the High Court to the applicants, they do not have the locus standi to commence the present action;

(6) that the approvals given to Pn Mariam and Hajjah Shaffiah were for logging only;

(7) that although premia were collected, it was due to the modified scheme of the new alienation policy at that time whereby land alienated for logging only could be occupied via temporary occupation license. Any premium collected could be used to develop another area for agricultural purposes; and

(8) that since the initial instruction to issue RSP was in connection with an approval for logging only any subsequent instruction must be taken to relate to approval for logging only.

But I should point out that initially and from another officer representing the first respondent it was submitted thus:

> Juprin:No affidavit filed on behalf of first respondent. Our stand is that we are not defending the decision in question. And I add that the offer should have been given to the earlier applicants. I am conceding to this application of the applicants. That ought to be the legal and administrative practice that the earlier applicants should get the land. In our opinion that is only fair unless the title has been issued. In this case no title has been issued. That is why we instructed Lands and Surveys to put things on hold on the applications of both parties until this court makes a final order.
>
> Mr Lee Chan King of Lands and Surveys confirms that.
>
> I make this concession fully aware of the fact that the second respondent may take action against first respondent. Whatever stand we make, somebody will sue the Government anyway.

However, it must also be noted that the next day the same officer made the following statement to the court purportedly to qualify his earlier statement, namely:

> Juprin: Based on what transpired yesterday and after getting another directions from the State Attorney General and the Director of Lands and Surveys, there are information which may be better to put into affidavit. To this end, we, will be seeking report from Lands and Survey. Will file within one week. In view of that my yesterday's stand may have to be qualified. The first respondent did not give such information earlier through no fault of theirs of course. I ask for adjournment.

In respose to the apparent concession although subsequently qualified, the learned counsel for the second respondent stated thus:

> Shim: I am taken by surprise by the concession of the first respondent. Anyway I submit that this court needs to consider the basic principle of judicial review in granting certiorari.
>
> I need time to check on the point now that first respondent has conceded.

And upon resumption of the hearing learned counsel for the second respondent went on to submit the following points, in summary thus:

(i) that the affidavits and statement filed by the applicants in support of this application do not disclose the complaints and the grounds;

(ii) that the present application is misconceived in that there was no decision of the first respondent nor was there any instruction issued. Further there was no interest in land created in relation to the said applications. To grant the orders sought for would tantamount to usurping the jurisdiction of the first respondent.

(iii) that the alienation to the second respondent is implicit that the said applications were not approved by the first respondent;

(iv) that there was element of deceit on the part of the applicants in that the purported requests for issuance of RSP were made to appear that the said Pn Mariam and Hajjah Shaffiah were still alive to sign those letters. The applicants did not come to court with clean hands;

(v) that no certiorari should be issued if there was another remedy available to the applicants;

(vi) that the fact that the area in dispute has already been alienated to the second respondent should be taken into account whether certiorari should be issued. To grant would expose the first respondent to liability for breach of contract;

(vii) that the conduct of the applicants should also be taken into consideration before certiorari is issued. Such conducts are the failure to disclose material facts, forged signatures, fraud and illegality; and

(viii) that admission of invalidity of the decision of the first respondent does not bind third party.

Learned counsel for the second respondent also went on to say this:

> Shim: I am supporting the submission of first respondent in particular on the issue of applicants' locus standi to commence this action. Secondly, certiorari is a discretionary remedy. I humbly urge this court to do justice in this case in considering the position of the second respondent. Their position is just like any investors who genuinely invest or increase their investment in Sabah. Nothing else to add.

The primary issues

From the affidavits filed and the arguments presented by the learned counsel for the respective parties I am of the view that in considering whether to issue the discretionary order of certiorari the following matters require examination, namely:

(1) whether the applicants have the locus standi to commence the present application;

(2) whether there was a decision made by the first respondent;

(3) if so, whether it is susceptible to judicial review (an order of certiorari and/or mandamus) and on what ground or grounds.

And incidental to issues (2) and (3) are the questions of:

(a) whether there was approval given by the relevant authority for the said applications and for what purpose;

(b) whether the instruction to issue the initial RSP was related to the approval, if any, and even if so, what was the initial RSP actually intended for;

(c) whether the said RSP was just an extension/renewal of the initial RSP issued earlier on;

(d) if the answer to (c) is in the affirmative and if the perception of the applicants on its issuance is indeed true, whether the said RSP was therefore issued beyond the purpose as stated in the initial RSP;

(e) and if the answer to (d) is in the affirmative, whether the said RSP can be cancelled, revoked or terminated in the way the first respondent did in this case;

(f) whether the applicants have come to court with unclean hands due to their conduct;

(g) whether there was non-disclosure of material facts by the applicants;

(h) whether the applicants have alternative remedy for their alleged grievance; and

(i) whether in the circumstances of this case and in the interest of justice, in particular, the interest of third party, the orders prayed for should not be granted.

Findings

(a) *Issue (1)*

This is in fact more of a preliminary point. Unfortunately it was not raised at the outset of the hearing by any of the respondents. Anyway it is premised on the principle that only the executor or administrator of a deceased is his legal representative for all purposes (see s 3 of the Probate and Administration Ordinance (Sabah) Cap 109). And learned counsel for the first respondent and duly supported by learned counsel for the second respondent submitted that the applicants did not have the necessary letters of administration obtained from the High Court. He is in fact disputing the validity of the 'Perintah Pembahagian Tanah' issued by the Mahkamah Rendah Syariah Sandakan on 29 August 1998. ('NA-1' of Noh's affidavit and 'RY-1' of Rosnah's affidavit). And it was held in *Comptroller of Income Tax v Yan Tai Min* [1965] 1 MLJ 255 that 'it is only on extracting the grant of a letter of administration that a person can be said to be duly clothed with a representative character and to have acquired a title to the estate so as to make him an administrator within the meaning of O 16 r 8 of the Rules of the Supreme Court and therefore in this case the defendant was not the administrator and the action could not be brought against him as administrator'. In another case of *King Hock Ching v Ung Siew Ping* [1974] 2 MLJ 16, Tan Chaw Thong J held that 'the Singapore grant (of a letter of administration) by itself confers no title on the plaintiff to institute this action as administrator of the estate of the deceased and the writ is therefore a nullity.'

But in the present case it is not so much of not having a letter of administration. Rather it is the orders obtained by the applicants that are being disputed. However, to my mind this is not a case of contentious probate. Neither is the first respondent having any interest in the estates of Pn Mariam and Hajjah Shaffiah. What matters is that there are before this court two orders issued by the Mahkamah Rendah Syariah Sandakan. And learned counsel for the first respondent failed to show that the said court did

not have the jurisdiction to issue such orders. Indeed I do not think he could have done so as it is clear under s 11(2) of the Syariah Courts Enactment No 14 of 1992 that the syariah lower court has the jurisdiction to hear and decide on matter pertaining to division of and inheritance of property, testate or intestate. Further, this court should be entitled to rely on s 114(e) of the Evidence Act 1950, as amended, in accepting the validity of the orders. Moreover there is nothing wrong for the applicants to go before the Syariah court for such orders even if it is also within the jurisdiction of the civil courts. Such concept has been aptly demonstrated in the case of *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 where the Chief Justice of the Federal Court even in a criminal matter said at p 247:

> Where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the civil court or a syariah court, he may be prosecuted in either of those courts.

Accordingly I find no merit in the objection of the learned counsel for the respondents as to the locus standi of the applicants.

(b) *Issue (2)*

To begin with I am not surprised that there is this confusion created by this present application. On closer examination of the alleged impugned decision it is in fact not obvious that there was a decision made by the first respondent which the applicants want this court to quash.

From the prayer sought for it makes reference to a decision of the first respondent to cancel the said RSP allegedly issued for the said applications. But learned counsel for the second respondent submitted that CKM-23, 24, 27 and 28 do not constitute a decision on the part of the first respondent. Meanwhile, the first respondent did not say or imply in any manner that he never made a decision. The second respondent is therefore only making an inference from the contents of the documents referred thereto. Anyway, I would say that CKM-23 and 24 are not particularly relevant since they only make reference to postponement of the work under the said RSP and not to cancellation which is the basis of the present application. CKM-28 meanwhile is a letter from the Jurukur Daerah, Lahad Datu to the private surveyor, Mr Sheak Kam Ti informing the latter of the cancellation of the said RSP. It is only CKM-27 that is from the first respondent to the Penolong Pemungut Hasil Tanah, Lahad Datu. And even in that letter the first respondent made no mention of cancellation of the said RSP. At most the first respondent stated that 'perlanjutan/pengeluaran RSP 98119088 sepatutnya tidak dibenarkan' which freely translated means 'the extension/issuance of RSP 98119088 should not have been allowed'. But at the same time the first respondent did not object to the contents of CKM-28. Could that omission be therefore taken as having the consequence of imputing to the first respondent the decision to cancel the said RSP as conveyed by CKM-28?

A I do not think so. In the absence of any instruction from the first respondent to cancel the said RSP imputation alone will not do.

Meanwhile, the present application could not be referring to CKM-23, 24 and 27 on their own as that would have put the application for leave beyond the permitted six weeks period. Hence it is mostly likely that
B CKM-28 is being referred to as containing the impugned decision. Alternatively, it could be the cumulative effects of those four documents referred to hereinabove. Anyway, whichever it is I must say that the applicants or their learned counsel should have indicated in clear term the impugned decision or at least the document or documents which contained such decision. Accordingly, in view of the ambiguity of whether there
C existed a decision of the first respondent susceptible to be reviewed and that in the application itself it is not specified as such and in the nature of prerogative remedies, being discretionary, on this ground alone that I should refuse the order sought for. In *Regina v Statutory Visitors to St Lawrence's Hospital, Caterham; Ex parte Pritchard* [1953] 1 WLR 1158 at p 1166, Parker J said:

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> I agree, and I would only add that in my opinion it cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or decision.

But I must add that the statement of Parker J is no longer a rigid rule today
E as in recent times even a recommendation in appropriate circumstances may be quashed by certiorari (see *R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex p Brough* (1987) 19 HLR 367).

And nearer home, the recent decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai*
F *Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 has made the position clear. In that case one of the issues was which decision of the council that was being questioned, that is, whether it was the council's decision on 20 July 1993, granting first extension of the planning permission, which imposed the disputed condition or the council's decision on 20 September 1993 which was mistakenly referred to as the decision 'imposing the additional
G condition that 30% of the units must be allocated as low cost at RM25,000 per unit'. In view of the ambiguity, his lordship Edgar Joseph Jr FCJ said this:

> It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of
H course, of the decision itself. It is therefore a matter of the first importance to correctly identify the decision sought to be impugned. Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. Failure to observe these basic requirements could
I have fatal consequences ... .

Be that as it may, in the present case I also observe that the Jurukur Daerah Lahad Datu in his own capacity and not on behalf of the first respondent

wrote CKM-28. And there is nothing in CKM-28 which show that the Jurukur Daerah Lahad Datu was under the direction of the first respondent to write it. Probably it might be due to the caption 'sila ambil perhatian/ tindakan segera' that came with the copy of CKM-27 forwarded to the said Jurukur Daerah that prompted the issuance of CKM-28. But that would be making an assumption which the applicants could have cleared before coming to this court for prerogative remedies. There is also no question of making an order against the decision of the Jurukur Daerah as he is not a party to the present proceeding (see *Majumder v Attorney General of Sarawak* [1969] 1 MLJ 132).

(c) *Issue (3)*

In the event that I am wrong under issue 2 and that indeed there was a decision of the first respondent to cancel the said RSP either through CKM-28 or the cumulative effect of CKM-23, 24, 27 and 28, it is also my considered opinion that in the exercise of my discretion the order of certiorari should not be issued in this case. Basically it is due to the fact that on the materials before me I find that there is no denial of legitimate expectation as alleged to the applicants or to the estates of Pn Mariam and Hajjah Shaffiah. And legitimate expectation herein may be understood as reasonable expectation and in the way as discussed by his Lordship Shanker JCA in the case of *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 where he said this, at pp 736–738:

> It was once thought and indeed Mr Das submitted that a legitimate expectation consisted only of an aggrieved person's right to be heard before a decision was taken which was adverse to his interests. With respect, the law has come very much further than that. The most recent exposition of this concept is to be found in the judgment of 'Simon Brown LJ in *R v Devon County Council, ex p Baker & Anor* [1995] 1 All ER 73 at pp 88 and 89. We think it should be set out here in full.
>
> What this case concerns is the administrator's duty to act fairly and in accordance with the procedural proprieties. How is the extent of this duty to be ascertained?
>
> Much of the argument before us, not only in the *Devon* case but also in the *Durham* case, centred upon the concept (doctrine, principle, call it what one will) of legitimate expectation. This concept, as it seems to me, has now become so widely and variously invoked that it is time to examine what actual assistance can be derived from it, in particular in situations such as arise here in *Durham*.
>
> It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used.
>
> (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v Secretary of State for the Home for the Home Dept; ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v Board of Inland Revenue; ex p MFK Underwriting Agencies Ltd*

A [1990] 1 All ER 91, [1990] 1 WLR 1545 and *R v Jockey Club; ex p RAM Racecourses Ltd (1990)* [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v Torbay BC; ex p Cleasby* [1991] COD 142, of the latter, *Ex p Khan.*

(2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904, [1969] 2 Ch 149, *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of *Roch J in R v Rochdale Metropolitan BC; ex p Schemet* [1992] 1 FCR 306 are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in AG for *New South Wales v Quin* (1990) 93 ALR 139 this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> 'No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.'

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589, [1972] 2 QB 299

and *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises, *Council of Civil Service Unions v Minister for the Civil Service* an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.

Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr Paul Craig's article 'Legitimate expectations: a conceptual analysis' (1992) 108 LQR 79. Rather it is an attempt at a broad categorization which may, I hope, clear away some at least of the many semantic confusions that have bedevilled this area of our law. (Emphasis added.)

The Federal Court did not reject the foregoing observation of the Court of Appeal when the case came up on appeal (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*).

His Lordship Edgar Joseph Jr FCJ said this:

In upholding the Society's plea that its legitimate expectations had been violated, when the Council imposed the disputed condition, the Court of Appeal had reproduced and approved verbatim the passages in the judgment of *Simon Brown LJ in R v Devon CC ex p Baker* [1995] 1 All ER 73 at pp 88 and 89, as showing that the concept of legitimate expectations has not only an impact on procedure but also a substantive impact, ... For our part, we prefer the view of Simon Brown LJ in *Ex parte Baker* and Sedley J in *Ex parte Hamble* as we find the reasoning there more persuasive.

From the assertions and contentions advanced for the applicants in the present case it is quite clear that the main thrust of their case is that the decision to cancel the said RSP resulted in the applicants, as the beneficiaries of the estates of Pn Mariam and Hajjah Shaffiah respectively, being deprived of the right to acquire the parcels of land that had been approved earlier. And it follows in their argument that the said decision was therefore unreasonable and further that the first respondent did not act fairly towards them.

Before going any further it is perhaps necessary to emphasize here that the applicants are not complaining of the cancellation of the said RSP per se. What they are saying is that approvals were given in connection with the said applications for the alienation of parcels of land for agricultural purpose and that the initial RSP was issued for that specific purpose. Meanwhile, it must also be borne in mind that the said RSP was given only as an extension/renewal of the previous one. Thus, it is crucial to determine whether indeed there were approvals for agricultural purpose granted to Pn Mariam and Hajjah Shaffiah in respect of the said applications. In addition thereto it is also necessary to examine the nature of the initial RSP issued in connection with the said applications.

Now, this intended exercise might be going beyond the usual course when considering an application for a prerogative remedy of certiorari, namely, to determine whether there is any procedural defect in the making

of an impugned decision. However, the trend nowadays is that in considering an application for an order of certiorari it is not only to examine for any procedural defects but also to consider if the impugned decision is indeed appropriate and just in the circumstances of the case. In the Court of Appeal, Gopal Sri Ram JCA, in the case of *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94 went on so far as to say this, at pp 105–106:

> Until very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of illegality or 'Wednesbury unreasonableness', the court merely examines the decision-making process and not the correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the majority decision of the Federal Court in *Ramachandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145. It is a landmark decision. It stands as a beacon lighting the path of future development in the field of public law. Edgar Joseph Jr FCJ, who delivered one of the majority judgments, exploded the theory that judicial review is always concerned only with the decision-making process and never with the decision itself. This is what he said (at pp 187–188):
>
> > 'Lord Diplock's first ground for challenge — namely, illegality — involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of Westminster City Council v Great Portland Estates plc [1985] AC 661, an ultra vires case involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land not the particular purpose of a particular occupier' was the concern of planning, and therefore, the authority could not seek to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the court was involved in the exercise of reviewing the impugned decision for substance and not just process.
> >
> > Lord Diplock's second ground for challenge — namely, irrationality — recognizes a different route whereby the substance of a decision may be reviewed by the courts. By this means, Lord Diplock made it clear that despite being legal— that is to say, within the powers conferred—a decision may nevertheless be struck down for being contrary to substantive principles. In the words of Lord Diplock:
> >
> > > "... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."
> >
> > In this regard, the case of *Hall & Co Ltd v Storeham-By-Sea UDC* [1964] 1 All ER 1, a planning case, affords a good illustration of how the courts in the United Kingdom do in practice review a decision for substance even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the road. Under town and country planning law, a local

authority may, in granting planning permission, impose such conditions as it may think fit. The court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. In effect, the court had examined the decision for substance, and held that the imposition of the condition was an abuse of power and unlawful. It is implicit in this decision that the court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.'

It follows that when the exercise of discretion by a public body, such as the appellant, is challenged, a court is entitled to — indeed it must — examine the facts and determine whether the decision arrived at is reasonable in the sense described by Edgar Joseph Jr FCJ in the foregoing passage. If it is then, it is safe from attack. If it is not, then, the appropriate remedy may be given: per Gopal Sri Ram JCA (Emphasis added).

Hence, I will begin by examining whether indeed there were approvals granted as alleged to the said applications or for that matter to Pn Mariam and Hajjah Shaffiah and if so, their nature. And that would involve the consideration of the incidental issues of (a) to (e) hereinabove.

It is the case of the applicants that Pn Mariam and Hajjah Shaffiah did secure approvals for the alienation of agricultural land from the Hasil Bumi as early as 1973. But from my reading of the purported approvals (CKM-3 and CKM-4) it is not obvious that they were for agricultural development and definitely not in relation to the said applications although in the purported approvals it was left opened for them to submit the specific areas of land they wished to have allotted to them. In fact both documents make reference to extraction charges. And CKM-4 referred to the application of Pn Mariam as 'permohonan puan untuk tanah berkayu balak' (freely translated 'puan's application for land with timber') thereby indicating that it was more for land with timber stand rather than for agricultural development. There is a mention of the 'Dasar Pemberian Tanah Baru' in CKM-4 but that does not signify anything since it was in fact only a general approval and not an approval for a specific area of land or in relation to the said applications. And in 'HDHT-4' of Dahalan's affidavit which is a letter from the Pengarah Tanah dan Ukur to the Setiausaha Hasil Bumi it is stated that under the 'main provision of the basit 'New Land Alienation Policy' (NLAP) timbered land is alienated for agricultural development of the same land allowing the approved applicant the proceeds of the timber subject to' certain terms which are not relevant here. And the letter continues: 'More recently since remaining timbered land has not always been suitable for agricultural development, Government has allowed the NLAP to be modified to allow proceeds from timbered land to be used to develop other substituted land but still subject to the general provisions of the NLAP'. Hence, it can be gleaned from this letter (HDHT-4) that an approval has to be related to a specific area of land first and not in vacuum before it can enjoy any benefit under the New Land Alienation Policy. And that probably explains the letter of the Setiausaha Hasil Bumi (HDHT-3) to the Penolong Pemungut Hasil Tanah, Beluran. But nothing came out of that letter. And

A I do not think that letter is now relevant for the purpose of this application.

Accordingly, it is my view that CKM-3 and CKM-4 on their own cannot be taken as approvals for agricultural development in respect of the said applications, specifically for the area of land now subject of dispute. I am fortified in my conclusion by the fact that indeed the Temporary
B Occupation Licenses (TOL) issued in connection with the said applications (CKM-8 and C-1) only allowed for logging. Thus, on the assumption that the area in dispute now is the same area as that was under the TOL given to Pn Mariam and Hajjah Shaffiah at best the TOL was therefore only a license to occupy for logging purpose. And it has been held that a land application alone does not entail any interest in land under the Ordinance.
C (see: *Lim Fong Tsin & 23 Ors v The Assistant Collector of Land Revenue & Ors* [1997] CLJ LN 7; *Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah* (OM No K 4 of 1992) (unreported)).

As regards the payment of premium in connection with the issuance of the TOL, I do not think it is of much help to the applicants' case. From
D 'HDHT-5' of Dahalan's affidavit it would appear that such was the practice until that letter put a stop to it. In fact that letter ended by stating 'those cases which have already been charged premium and other annual dues no refund should be allowed'.

Further, from the document 'CKM-7' it is also clear that the direction of the Pengarah Tanah dan Ukur to the Jurukur Daerah Lahad Datu to
E issue RSP in relation to the said applications was only confined to logging activity. And CKM-7 seems to be the basis for the renewal/extension that resulted in the issuance of the said RSP the subject matter of the present application.

Now, since there was no approval granted of any specific area of land
F for agricultural purpose in connection with the said applications and the fact that even the initial RSP issued in connection with the said applications was authorized for logging only, there was therefore no reason for the issuance of the said RSP as a renewal/extension of the previous one if it was intended for agricultural purpose. In other words, there was therefore nothing to renew or extend in the first place as there was no initial RSP issued for
G agricultural purpose contrary to the averment of the applicants. And it is not the case of the applicants that there was a cancellation of the said RSP irrespective of its purpose. What they are saying is that the said RSP was cancelled while being a renewal/extension of an earlier RSP issued in connection with approvals granted for agricultural purpose pursuant to the
H said applications. However, for the reasons given hereinabove there is no merit in their stand. It is therefore my considered opinion that the act or decision of the first respondent in cancelling the said RSP, if at all the letter of the Jurukur Daerah Lahad Datu (CKM-28) can be attributed to him, is reasonable in the circumstances free from the deficiencies or defects as laid down in such celebrated cases as *Associated Provincial Picture Houses Ltd v*
I *Wednesbury Corp* [1948] 1 KB 223 and *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374.

Furthermore, there could not have been any legitimate expectation of

the applicants in the sense of 'a substantive right: an entitlement that' they assert '*cannot be denied*' them in view of the positions of the initial RSP and the purported approvals as discussed herein. For the same reason neither could it be said that there existed the applicants' 'interest in some ultimate benefit which they hope to retain (or, some would argue, attain)'.

And that leads me to another point, namely, whether the issuance of the said RSP was devoid of any legal basis as it was based on the misconception that there was an earlier RSP issued in connection with an approval for agricultural purpose pursuant to the said applications. And if so, whether there was still a need for compliance with the rule of natural justice or to act fairly on the part of the first respondent.

As it is the case of the applicants that the said RSP was issued as a renewal/extension of an earlier RSP given in connection with approvals for agricultural purpose pursuant to the said applications and for the reasons given herein in my concluding that there was no such approvals or initial RSP, it is therefore obvious that the issuance of the said RSP was void of any legal basis in the context as understood by the applicants.

It might have been another point if the complaint of the applicants is that the said RSP was cancelled irrespective of its purpose or the initial purpose of the earlier RSP. But I am not asked to consider this application on that premise. Thus, I decline to do so.

If therefore the issuance of the said RSP was devoid of any legal basis and thus emitted no right or legitimate expectation to the applicants or to the estates of Pn Mariam and Hajjah Shaffiah, it follows that there was no question of the first respondent being required to provide a hearing or even to act fairly before cancelling the said RSP. Such duty although 'lying upon every one who decides anything,' (see *Board of Education v Rice* [1911] AC 179; *Re Pergamon Press* [1971] Ch D 388), should also be guided by the principle of whether in the first place there would be legal rights or liberties adversely affected for failing to observe such duty. Hence, in the case of *Schmidt v Home Secretary* [1969] 2 Ch D 149 the English Court of Appeal held that the alien students of 'scientology' had no legitimate expectation for the extension of their entry permits to the United Kingdom and thus had no right to a hearing. This is what Lord Denning said at p 170:

> ... The speeches in *Ridge v Baldwin* [1964] AC 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

Other related issues

In view of the findings that I have arrived at hereinabove I do not think it is necessary for me to consider the other points raised by the learned counsel for the respective parties. Suffice it to say that having perused them I do not think they can persuade me to vary my earlier findings herein. In the event of the applicants having incurred costs and expenses as a direct consequence of the issuance of the said RSP they are at liberty to commence

an action to recover such loss, if any. This is not a case of the applicants having no other remedy available at all.

Conclusion

For the reasons hereinabove and in the exercise of my discretion this application of the applicants is therefore refused and dismissed with costs to be taxed unless agreed. And it follows that the prayer for an order of mandamus is also refused accordingly.

Application dismissed.

Reported by Jafisah Jaafar